

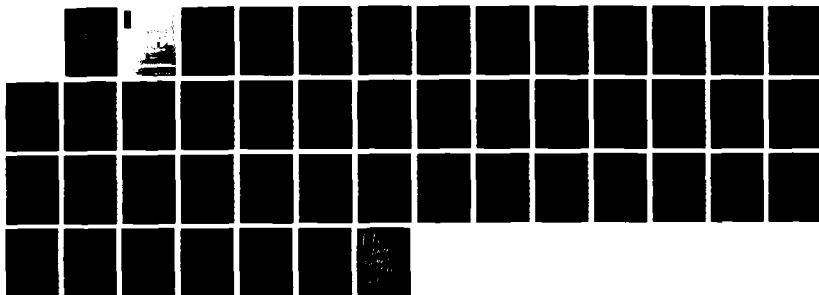
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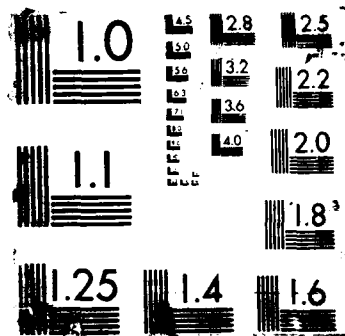
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# USAWC MILITARY STUDIES PROGRAM PAPER

## WHO'S IN CHARGE

The Federal / State Conflict for Control  
of the  
National Guard

AN INDIVIDUAL STUDY PROJECT

by

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30 March 1988

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ABSTRACT

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WHO'S IN CHARGE  
The Federal / State Conflict for Control  
of the  
National Guard

CHAPTER I

INTRODUCTION

More than most American institutions, the National Guard is a creation of the Constitution. The antecedent of the Guard was created by the Constitution in what has become known as the "Militia clause". Like much of the constitution the Militia clause was a compromise, in this instance between those who wanted a standing, professional army and those who emphasized the traditional role of the citizen-soldier militiaman.<sup>1</sup> It is ironic that the 200th anniversary of the United States Constitution comes at a time of constitutional controversy for the National Guard.

The question of who's in charge of the National Guard first arose in January 1985 when Governor Deukmejian of California refused to permit 450 members of the California National Guard to participate in an anti-armor training exercise in Honduras.<sup>2</sup> As opposition to President's Reagan's policies in Central America grew, several additional governors used their consent authority to prohibit their state's guardsmen from scheduled training in this region. These governors based their position on a 1952 law that made their consent a prerequisite for any federal call-up to active duty, short of a national emergency. In order to maintain the historic blend of state and federal control over the National Guard, Congress limited the scope of the consent requirement in what has become known as the "Montgomery Amendment". In January 1987 Governor Rudy Perpich of Minnesota filed suit in United States District Court seeking a declaratory judgment that the "Montgomery Amendment"



was an "unconstitutional infringement on the power of the states by the federal government."<sup>3</sup> What started as the refusal of a single governor in 1985 to allow his guardsmen to participate in training activities in Honduras, has become the most significant issue to affect the National Guard since the end of World War II. LTG LaVern E. Weber (ret.), Executive Director, National Guard Association of the United States (NGAUS) has stated:

What is more likely is that the Department of Defense would reconsider the policy of 'increased reliance' on the National Guard as the largest, best equipped and most combat ready component of the Total Force, begin to withdraw equipment and missions and perhaps even eventually attempt to examine the merger bugaboo....that we would then be fighting literally for the continued existence of the National Guard's federal mission does not seem to be in dispute.<sup>4</sup>

#### ENDNOTES

1. Ansel M. Stroud, Jr. "Keeping The Militia Alive and Well", National Guard, (March 1987), p. 2.

2. Perpich v. United States Department of Defense, United States District Court, District of Minnesota, Third Division, Defendant's Memorandum of Law (DOD), p. 30 (hereafter referred to as DOD Memorandum, District of Minnesota).

3. Edward J. Philbin, "States Rights", National Guard, (April 1987), p.21.

4. La Vern E. Weber, "State Control Issue: Words For Friends and Foes", Capital Focus National Guard, (August 1987), p. 10.

## CHAPTER II

### HISTORICAL PERSPECTIVE

The militia that fought the Revolution was initially little more than a home-guard of able bodied men. Although armed, they were, for the most part, untrained and their shortcomings were frequently the subject of bitter complaint. Their unreliability stemmed from a lack of standardization in training and equipment.<sup>1</sup> George Washington's earlier opinion of the militia was expressed in his September 1776 letter to the President of Congress warning:

"To place any dependence upon Militia, is, assuredly resting upon a broken staff....If I was called upon to declare upon Oath whether the Militia have been most serviceable or hurtful upon the whole; I should subscribe to the latter."<sup>2</sup>

By the end of the war, however, the militia had proven to be a reliable military force. Experienced, well-disciplined, trained and better equipped, the militia had served its country and its commander well. While still in command of the Continental Army, George Washington prepared, at the request of the Continental Congress, his thoughts with reference to the defense of the United States, in order to reconcile the principles of security with economy and the Republican institutions which they were intent upon establishing. In May 1783, he wrote his views and transmitted them to Lt. Colonel Alexander Hamilton, Chairman of the Committee of Congress. In this document, entitled "Sentiments on a Peace Establishment", Washington stated that:

A peace establishment for the United States of America may in my opinion be classed under four different heads, vizt:

First. A regular and standing force, for garrisoning West Point and such other post upon our northern, western, and southern frontiers, as shall be deemed necessary to awe the Indians, protect our trade, prevent the encroachment of our neighbors of Canada and the Florida's, and guard us at least from surprise, also for security of our magazines.

Secondly. A well organized militia; upon a plan that will pervade all the States, and introduce similarity in their establishment, maneuvers, exercise and arms.

Thirdly. Establishing arsenals of all kinds of military stores.

Fourthly. Academies, one or more for the instruction of the art military; particularly those branches of it which respect engineering and artillery, which are highly essential, and the knowledge of which is most difficult to obtain. Also manufactories of some kinds of military stores.<sup>3</sup> (emphasis added)

Washington advocated a "well organized, militia" be set apart, properly officered, and periodically trained under uniform supervision in time of peace to assure their quick formation in time of war. They would thus form the Continental Army of the future.<sup>4</sup> No such body of militia existed during the nineteenth century. Because of political expediency, the substance of Washington's "Sentiments" were rejected by the First Congress, the paper itself was forgotten and militia came to mean undisciplined and badly regulated forces.<sup>5</sup>

During the Constitutional Convention, George Mason introduced the idea that the federal government should have the power to regulate the militia. Mason also stressed that an efficient militia would reduce the requirement for a large regular army, an idea that would bear fruit 180 years later in the "Total Force" concept. Other speakers, mostly veterans with nationalist backgrounds, explored various aspects of a standing army discussing the idea, first raised by George Washington at the end of the Revolution, of a national select militia force. Oliver Ellsworth objected, arguing that the creation of such a force would lead to the erosion of the state militia. Roger Sherman argued that the militia had state responsibilities in addition to their federal mission. Mason proposed a modification of his motion to make explicit reference to this dual mission of the militia. After being referred to committee for further study, wording was proposed that reflected the underlying Federalism of the Constitution, splitting authority between the central government and the states in a system of checks and balances.<sup>6</sup> William Livingston presented the

language to the convention that in large measure was finally adopted as the militia training clause:

To make laws for organizing, arming and disciplining the Militia and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers and the authority of training the Militia according to the discipline prescribed by the United States.<sup>7</sup>

During debate to consider this proposal, the veterans, led by Rufus King, explained the meaning of three key terms. He said that: "by organizing, the committee meant proportioning the officers and men - by arming, specifying the kind, size and caliber of arms - and by disciplining prescribing the manual exercise evolutions."<sup>8</sup> Thus the Constitution gave the President command of the militia when in federal service but recognized the state basis of the militia by reserving for the states the appointment of officers and the authority of training the militia according to the discipline prescribed by Congress.

As adopted the militia was authorized by article I, section 8, clause 15 and 16 of the United States Constitution, which says in part:

The Congress shall have power....

(15) To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

(16) To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;<sup>9</sup>

Although not part of the "Militia clause" the militia was also referred to by article II, section 2, clause 1 giving the Executive Branch the following authority:

(1) The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States;<sup>10</sup>

With the approval of the Constitution, these broad militia powers were enacted, but in order to implement their intent, additional enabling legislation was required. In January 1790, John Knox transmitted to Congress a proposal that retained all the essential features of Washington's "Sentiments on a Peace Establishment". Legislation was introduced in 1790 and 1791 but not until 1792 was Congress able to provide for the "well-regulated militia" which the Bill of Rights had declared "necessary to the security of a free State".<sup>11</sup> As adopted, the "Militia Act of 1792" was so significantly different from Knox's original proposal that it was opposed by its sponsor. President Washington signed the bill but continued to recommend militia legislation as though none had been passed. "The Militia Act of 1792" would be the legal basis of the militia until 1903. This act required that all eligible males between the ages of 18 and 45 were obligated to the military service of the nation. They were required to muster once a year and to buy their own equipment. No federal funding was provided. Unfortunately, there were no specifics on training standards, frequency of training or federal inspection to ensure a national standard.<sup>12</sup> State militia laws passed subsequent to the "Militia Act of 1792" varied considerably. Only Pennsylvania, Massachusetts, New York and Connecticut provided state funds and built strong militias. The other states let their militias fall into disarray.<sup>13</sup> The fundamental problem with the "Militia Act of 1792" was its broad universality that "....imposed a duty on everyone with the result that this duty was discharged by no one."<sup>14</sup>

For over 100 years the Congressional power to set standards for the militia lay dormant. An awareness of the critical need for change came as a result of problems identified during the Spanish-American War. Secretary of War

Elihu Root reported in December 1901:

It is really absurd that a nation which maintains but a small Regular Army and depends upon unprofessional citizen soldiery for its defense should run along as we have done for one hundred and ten years under a militia law which never worked satisfactorily in the beginning, and which was perfectly obsolete before any man now fit for military duty was born. The result is that we have practically no militia system, notwithstanding the fact that the Constitution makes it the duty of the Federal Congress 'to provide for organizing, arming, and disciplining the militia,' and 'for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.'<sup>15</sup>

Significant change came via the "Dick Act of 1903". Through this Act, Congress began to utilize the power given it in the Constitution to organize, arm and set the standard of training for the militia. The "Dick Act" provided for an organized militia which would be called the National Guard and be organized along the lines of the Regular Army. Federal funds would be provided to states that assembled their soldiers at least 24 times a year for drill, provided a minimum of five days of summer encampment and had a formal inspection by an Active Army officer. In addition, a Regular Army officer would be assigned as advisors to units of the National Guard at the request of the governors. Guardsmen were allowed to attend Army service schools and most importantly, Guardsmen were given federal pay when participating in joint maneuvers with Regular Army units.<sup>16</sup>

The "Dick Act" was followed by the "Militia Act of 1908" sometimes called the "Second Dick Act. This Act expanded the process begun in 1903. Appropriations to the Guard were increased, the nine month limit on federal service was removed and the President was given the authority to fix the term of service. Most significantly, the National Guard was to be available within or outside the territory of the United States. This authority was questioned by Attorney General Wickersham in a 1912 opinion, concurring with the Judge Advocate

General of the Army, that there was no constitutional warrant for such Federal use of the militia beyond the territory of the United States.<sup>17</sup>

The process of military reform of the militia continued with the "National Defense Act of 1916". The number of drill periods was increased to 48 and summer encampment was changed from five to 15 days. Guardsmen would be paid for both drill and summer camp. The President received the authority to assign Regular Army advisors to National Guard units without gubernatorial request. While the states retained their right to appoint officers, their qualifications were federally prescribed. Federal recognition was now required for each officer as was federal recognition for each unit. Every soldier was required to take a dual oath to both the United States and to their respective state. Officially, the name of the reorganized militia would be the National Guard. One serious issue that was unresolved by the Act of 1916 was that it failed to provide a mechanism for the reconstitution of the Guard after being drafted into federal service. Because of this failure, with the end of World War I, the Guard was not immediately reconstituted.<sup>18</sup>

Despite an effort by elements within the war establishment to abolish the Guard, the National Guard was reconstituted in 1922 under the "Army Reorganization Act of 1920". This Act provided that when the President ordered the National Guard to federal service, it would revert, upon release, to its former status. The Militia Bureau of the War Department created by the Act of 1916 would now be headed by a National Guard Officer with a minimum of 10 years experience and at least the rank of Colonel. The Act of 1920 officially recognized that the Army consisted of the Regular Army, the Army Reserve and the National Guard. The National Guard stood apart from the Army structure except when mobilized for federal service. This aspect still required the necessity for drafting National Guardsmen into federal service rather than simply trans-

ferring units into federal service. Discussions and studies among members of the National Guard concerning this problem culminated in "resolution 14" of the National Guard convention of 1926 held at Louisville which stated in part:

That we hereby reaffirm our position heretofore declared with regard to our status, and that we favor appropriate amendments of the National Defense Act so that the federally recognized National Guard shall at all times, whether in peace or war, be a component of the Army of the United States, its status under the Constitution being preserved, so that its government when not in the service of the United States shall be left to the respective States, and that all federally recognized officers thereof shall be duly appointed and commissioned therein.<sup>19</sup>

A special War Department Committee met in Washington in October 1927 to consider resolution 14. The report of the committee clearly pointed out that the National Guard, as created and existing under the "National Defense Act of 1920", was the organized militia constituted under the militia clause. In order to be available as part of the Army, the officers and men of the National Guard must first be drafted into the Federal service as individual citizens. More importantly, the committee reached the conclusion that Congress had the power under the Army clause to amend the National Defense Act of 1920 so as to establish a reserve organization as part of the United States Army composed of officers and men of the States National Guard and that the organization of such reserve would not affect the administration, officering, training and control of the National Guard as state forces in time of peace.<sup>20</sup>

The 1933 Congressional Committee on Military Affairs was influenced to a great extent by Washington's "Sentiments on a Peace Establishment".<sup>21</sup> These views were never published and were not generally known until Brig. Gen. John McA. Palmer (ret.) discovered them in 1929 among the unpublished writings of General Washington preserved in the Library of Congress. The committee concluded that:



The pending bill, with reference to the National Guard, is an earnest effort to give the same more completely that status and relation to our national institutions contemplated by the fathers and founders of the Republic....It is our belief that the present bill conforms as nearly as possible to the ideals and principles comprehended by Washington in his magnificent statement entitled "Sentiments on a Peace Establishment."<sup>22</sup>

Frederick Wiener in his classic 1940 treatment of "The Militia Clause of the Constitution" reached a different conclusion when he wrote:

....the fact of the matter was that their work placed the final mark of inadequacy on the militia clause. For the 1933 Act proved conclusively that a well-regulated militia is impossible of attainment under the militia clause, and can be organized only by resort to the plenary and untrammelled powers under the army clause.<sup>23</sup>

The Act of 1920 was amended in 1933 by creating the National Guard of the United States whose personnel and organization were identical to the National Guard of the various states. This new organization was part of the reserve component of the Army and was administered under the Army clause of the Constitution rather than the Militia clause. Today every Guardsmen is both a member of the reserve and their state militia and can be called to federal service as militia, through the Militia clause, or ordered to active duty as part of the reserve through the Army clause.<sup>24</sup>

After the Korean Conflict, Congress enacted "The Armed Forces Reserve Act of 1952" to strengthen the reserve components of the Armed Forces. This was needed because the partial mobilization required during the Korean Conflict proved that the Reserves were not in an adequate state of readiness.<sup>25</sup> The legislation provided for seven reserve components and three different categories of reserves - ready reserves, standby reserves and retired reserves - subject to different degrees of priority for recall to active duty. In its original form, the bill contained provisions for ordering members of all reserve components to active duty with the consent of the individual member or

for not more than fifteen days without the consent of the person affected. The National Guard Association of the United States objected to the bill and claimed that it violated the Militia clause. Their objections, however, were not focused on the active duty provisions, but to a provision that would have allowed federal authorities to transfer reserve officers to State National Guard Units without State concurrence.<sup>26</sup> The association expressed their concern stating:

....that the language in the present bill, coupled with a appropriation to the National Guard to the United States, would make it possible for the Federal authorities to take over entirely the administration and training of the National Guard.<sup>27</sup>

To counter what it perceived as federalization of the Guard, the National Guard Association proposed an amendment requiring the consent of the governor of the state concerned before National Guard units could be called to active duty for training.<sup>28</sup> The requirement for a governor's consent received no comment in the report of either house, nor in the conference report.<sup>29</sup> Congress enacted the gubernatorial consent proposals into law<sup>30</sup> and these provisions remained essentially unchanged until 1986 when Congress limited the scope of consent through what has become known as the "Montgomery Amendment."<sup>31</sup>

#### ENDNOTES

1. Samuel J. Newland, The Militia's Role in National Defense: A Historical Perspective, p. 3.

2. George Washington in a letter to the President of Congress, September 24, 1776, The Writings of George Washington from the Original Manuscript Sources, John C. Fitzpatrick ed., Vol. 6, pp. 110,112.

3. George Washington in a letter to Lt. Colonel Alexander Hamilton, chairman of the Committee of Congress on the Peace Establishment, May 2, 1783, The Writings of George Washington from the Original Manuscript Sources, John C. Fitzpatrick ed., Vol. 26, pp. 374-375.

4. U.S. Congress. House. Committee on Military Affairs, National Guard Bill of 1933, p. 1 (hereafter referred to as "National Guard Bill of 1933").
5. Frederick B. Wiener, "The Militia Clause of the Constitution" Harvard Law Review, (December 1940) pp. 183, 189-191.
6. Wright, "Citizen, Soldiers and the Constitution", p. 37.
7. "NGAUS *Amicus Curiae* Brief As Filed In U.S. District Court", National Guard, (September 1987), p. 25.
8. Ibid.
9. Constitution of the United States, Article I, Section I, Clause 15 and 16.
10. Constitution of the United States, Article II, Section II, Clause 1.
11. Constitution of the United States, Amendment II.
12. Newland, The Militia's Role in National Defense: A Historical Perspective, p. 6.
13. John K. Mahan, History of the Militia and the National Guard pp. 52-59 and 78-83.
14. Wiener, "The Militia Clause of the Constitution" Harvard Law Review, p. 187.
15. Elihu Root, Reports of the Secretary of War (1902) pp.34-35 as reported in Wiener. "The Militia Clause of the Constitution" Harvard Law Review, pp. 194-195.
16. Wiener, "The Militia Clause of the Constitution" Harvard Law Review, pp. 193-196.
17. Ibid. p. 197
18. Newland, The Militia's Role in National Defense: A Historical Perspective, p. 16-18.
19. "National Guard Bill of 1933", p. 2.
20. Ibid. pp. 2-4.
21. Ibid. p. 26.
22. "National Guard Bill of 1933", p. 25.
23. Weiner, "The Militia Clause of the Constitution" The Harvard Law Review, p. 209.
24. "National Guard Bill of 1933" pp. 18-21.

25. U.S. Congress, House, Committee on Armed Services, Armed Forces Reserve Act of 1951, p. 11. (hereafter referred to as "Armed Forces Reserve Act of 1951).

26. U.S. Congress, House, Committee on Armed Services, Reserve Components Bill, pp. 475-476.

27. U.S. Congress. Senate, Senate Subcommittee on Armed Services, Armed Forces Reserve Act, p. 127.

28. Ibid. p. 246.

29. See H.R. Conf. Rep No. 2445, 82d Cong., 2d Sess.(1952); S. Rep No. 1795, 82d Cong., 2d Sess. (1952); H.R. Rep No. 1066, 82d Cong, 1st Sess. (1951).

30. "Armed Forces Reserves Act of 1952," in United States Code Congressional and Administrative News, 1952, Vol. 1, pp. 468-469.

31. In 1956 these sections were codified into positive law as sections 672(b) and 672(d) of Title 10 U.S.C., Act of August 10, 1956, ch 1041, 70A Stat Vol. 27 Stat. p. 27.

## CHAPTER III

### CONCEPT OF TOTAL FORCE

Like other parts of the Constitution, the language of the Militia clause has proven to be remarkably adaptive to current problems and can be given a modern interpretation. The framers of the Constitution intended that the new nation would reduce its reliance upon a large standing army by relying on an effectively organized, armed and trained militia. A militia organized, armed and trained to a uniform standard to permit its integration with the standing army. Today, this principle is known as the "Total Force Policy". The Total Force Policy, as articulated in Melvin R. Laird's August 1970 policy statement, is based upon increased reliance on the National Guard and other reserves for immediate availability. He stated that "Guard and Reserve units and individuals of the Selected Reserve will be prepared to be the initial and primary source for augmentation of the active forces...." This concept allowed the active forces to reduce in manpower and concentrate on accelerated modernization. Subsequently, many missions in the national interests were assigned to the Guard and Reserve.

The renewed emphasis on a total force concept was probably a result of the deficiencies noted in the partial mobilization of 1961 and 1962. In an effort to correct some of these problems, the Air Force published Air Force Regulation 45-60 in February 1963. This regulation was the first official statement of a Total Force approach to military planning. In 1966, Dr. Theodore C. Marrs, Deputy Assistant Secretary of the Air Force for Reserve Affairs, commissioned a RAND study in the roles and missions of the Air Force in the mid 70's, focusing on the idea of the most cost effective mix to meet the threat. The report concluded that by using a total force concept, we could have the same size force for half the price or a larger force for the same cost. This

idea was appealing in view of tight budgets, rising costs and a hostile American attitude toward a large draft supported active force. Perhaps even more important in generating DOD attention was the performance of the Air National Guard and the Air Force Reserve units mobilized in 1968. These units, with their traditional high degree of readiness and their ability to deploy and employ upon mobilization, showed that reserve forces could make a timely contribution to our national security.<sup>1</sup>

In 1988 the Total Force is a reality. When our nation made the decision to move to a volunteer military and rely upon a Total Force, the role of the National Guard in the defense equation significantly changed. The Army and Air National Guard are major, fully integrated elements of our national deterrent strategy and our warfighting capability. National Guard units have a global mission in the event of mobilization, so much so that contingency plans to counter aggression in every Unified Command cannot be effectively executed without committing part or all of the National Guard and Reserve Forces in the same time frame as the Active Forces. The Guard and Reserve were available and used in Lebanon, Grenada, and most recently in the retaliatory operation against Libya. This reliance on the reserve components has required a substantial investment of resources in manning, equipment and training to ensure that these forces can fulfill their role in the total military structure.<sup>2</sup>

The Army National Guard has 453,854 members in 10 divisions, 18 separate combat arms brigades, three medical brigades, four armored cavalry regiments two Special Forces groups, one special operations aviation battalion and 17 major headquarters. This represents 32% of the total Army's strength and 43% of its combat units. The Army Guard provides 100 per cent of the TOW light anti-tank infantry battalions, 100 per cent of the infantry scout troops, 100 per

cent of the heavy helicopter companies, 46 per cent of the pathfinder units, 73 per cent of the infantry battalions, 57 percent of the armored cavalry regiments, 49 per cent of the field artillery battalions, 43 per cent of the armored battalions and 47 per cent of the mechanized infantry battalions. The Air National Guard has 114,383 members in 91 separate flying units and 242 specialized mission support units. The Air Guard provides 78 per cent of the nation's fighter interceptor force, 49 per cent of the tactical reconnaissance force, 32 per cent of the tactical airlift, 26 per cent of the tactical fighters, 17 per cent of the air refueling tankers and 14 per cent of the air rescue and recovery capability. This represents 14.3% of the total Air Force strength and 26% of its combat units.<sup>3</sup>

The National Guard is now better equipped than at any time in its history. More than \$1.6 billion in new and displaced equipment was distributed to Army Guard units in FY 85 and a similar amount in FY 86. New equipment includes the M1 tank, Bradley fighting vehicles, improved TOW vehicles, fire support team vehicles, M198 howitzers, Chaparral systems and AH-1 and UH-60 helicopters. The Air Guard flies everything from the giant C-5A Galaxy to the sleek F-16 Fighting-Falcon. If the Guard were to be mobilized at the beginning of FY 87, it would be able to field approximately 80 per cent of its required equipment in terms of dollar value. Through the use of suitable substitute items, this capacity could be raised to approximately 84 per cent. This compares favorably to 87 per cent equipment availability for the active components for the same line items.<sup>4</sup>

The support that the Guard has received is related to the reliance and trust being placed upon it. The Guard has taken its commitment seriously. During annual training or on individual assignments, National Guard units and members work side by side their active counterparts. Guard participation in

joint exercises provides realistic training and increases readiness. Whether its a battalion going through the National Training Center or an entire infantry brigade deploying to Germany to take part in REFORGER, National Guardsmen are able to train as they would fight. In 1985, a total of 42,776 members of the Guard trained in 40 different countries around the world. Among the largest continuing operation is the National Guard's participation in Central America. Through 1986, nearly 20,000 troops have worked on engineering, artillery and infantry assignments plus a variety of support activities in Panama and Honduras. Guardsmen have had a chance to train in their career specialties, under conditions that we could never duplicate in the United States.<sup>5</sup>

#### ENDNOTES

1. Robert W. Hunter, "The Reserve Forces and the Total Force Concept", Air Force, (January 1973) pp. 54-59.
2. James H. Webb, Jr., "Unique Progress Made in Readiness", The Officer, (February 1987), pp. 26-33.
3. "The Total Force", National Guard, (April 1987), pp. 76-78.
4. Webb, "Unique Progress Made in Readiness", p. 32.
5. Herbert R. Temple, Jr. "Minute Men Of The '80s", The Officer, (February 1987). pp. 108-111.



## CHAPTER IV

### CENTRAL AMERICA IS NOT THE ISSUE

Since the advent of the "Total Force" concept, the Department of Defense (DOD) has steadily increased the responsibilities of the National Guard. Congress has encouraged this shift as a cost-saving measure and the state governors and adjutant generals have endorsed it as a means to extra federal funding and resources. Beginning in 1985, however, the consensus built up over the 15 years faltered as DOD continued to send Guardsmen to Honduras during the national debate over aid to the Nicaraguan "Contras" and President Reagan's Central American policy in general.<sup>1</sup> In January of 1985, Governor Deukmejian (D) of California refused to permit 450 members of the California National Guard participate in an anti-armor training exercise in Honduras. In March of 1986, Governor Joseph E. Brennan (D) of Maine refused to send troops on previously scheduled maneuvers stating:

Basically, I don't believe Honduras is a very safe place to train. Secondly, I personally do not happen to agree with our Central American policy. I think we're inching our way into another Vietnam.<sup>2</sup>

Other states seemed ready to follow his lead. Governor Dukakis (D) of Massachusetts barred any participation in Honduras maneuvers not yet scheduled. The governors of Arizona, Washington, New York, Kansas and Texas have raised questions or placed conditions on participation. In Iowa, Oregon and elsewhere, these maneuvers have stimulated fights between Democratic legislators and Republican governors. Some governors have found themselves torn between critics of administration policy and their National Guard troops who want to go. The Guard finds itself mired in the middle of the controversy. While fully endorsing the challenge of more realistic training and mission responsibility, the Guard feels a strong allegiance to its state roots.

The governors base their stance largely on a 1952 law that makes their consent a prerequisite for any federal call-up to active duty, short of a national emergency. The gubernatorial consent provisions now codified at Title 10 United States Code, section 672 which say in part:

672(b) At any time, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, in an active status in a reserve component under the jurisdiction of that Secretary to active duty for not more than 15 days a year. However, units and members of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor of the State, Territory, Puerto Rico, or the Canal Zone, or the commanding general of the District of Columbia National Guard, as the case may be. (emphasis added)

672(d) At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned. (emphasis added)<sup>3</sup>

The House Armed Services Committee expressed their concern over this controversy stating that such refusals on the part of the state governors deny guard members the opportunity for valuable training, an action that could adversely affect the readiness of their units and their reliability for contributing to Total Force requirements. The committee strongly urged the Department of Defense to "consider withholding Federal funds from those states that: (1) continue to refuse to participate in overseas training associated with their wartime mobilization and deployment mission; or (2) by refusing overseas training assignments will prevent the National Guard from accomplishing its assigned mission."<sup>4</sup> When this issue of control of the

National Guard first arose, the Chief of the National Guard Bureau intended to deal with it in his capacity as the single DOD manager for federal oversight, funding, control and direction of National Guard training. Options available to him were to withdraw federal recognition, equipment and support from states refusing to deploy their Guardsmen for training.

In June 1986, Senators Pete Wilson (R-California) and Phil Gramm (R-Texas), because of their concern about the integrity of the Total Force Policy, drafted an amendment to the FY 87 Senate Defense authorization bill. The Wilson-Gramm amendment specified that training of the National Guard outside of the United States would be in federal service with units ordered to active duty. This authority was based upon the Army clause of the Constitution and would have not required the governors' consent authority on any grounds. Guardsmen scheduled for such training could not be kept in the state even for local emergencies.<sup>5</sup> In June 1986, Defense Secretary, Casper W. Weinberger endorsed the Wilson-Gramm amendment to limit the governors' authority over their National Guard units. In August 1986, at the annual Governor's Association meeting, governors of both parties signaled the Reagan administration and Congress that they wanted to decide for themselves whether or not to send their troops on training missions to Central America. Critics and supporters of the administration's policy in Nicaragua and surrounding countries joined in an unanimous vote reaffirming the governors traditional command over the National Guard. The resolution carried largely as an expression of federalism rather than a criticism of foreign policy.<sup>6</sup>

The National Guard Association of the United States (NGAUS) and the Adjutants General Association of the United States (AGAUS) initially opposed any legislation that would fundamentally shift control of the National Guard from the states to the federal government but began to believe that some legislation

was necessary because of the severe erosion of the Guard's credibility as a member of the Total Force. NGAUS and AGAUS believed that the issue was properly addressed with the introduction, by Representative G.V. "Sonny" Montgomery (D-Mississippi), of the following amendment:

With regard to active duty outside the United States, its territories, and its possessions, the consent of the Governor described in subsections 672(b) and 672(d) of title 10 may not be withheld in whole or in part because of any objection to location, purpose, type, or schedule of such active duty.

The "Montgomery Amendment" was intended to make certain that state political views on issues of foreign affairs would not influence a governor's decision on issues of national military affairs. Based upon the Militia clause and not the Army clause, the "Montgomery Amendment" permits the governors to withhold their consent for activities within the United States for any reason and to withhold their consent for activities outside the Continental United States activities for any reason other than those specified.<sup>8</sup> The "Montgomery Amendment" was enacted as section 522 of the "Defense Authorization Act for Fiscal Year 1987" and signed into law by President Reagan in November 1986.<sup>9</sup>

In January 1987, based upon the question of constitutionality raised by State Attorney General Hubert H. Humphrey III, Governor Rudy Perpich (D-Minnesota) filed suit in United States District Court in St Paul. Governor Perpich was seeking a declaratory judgment that the "Montgomery Amendment" was an "unconstitutional infringement on the power of the states by the federal government." The governor said he objects "in the strongest terms to the federal government's continued erosion of state powers."<sup>10</sup> Eleven states (Arkansas, Colorado, Delaware, Hawaii, Iowa, Kansas, Louisiana, Maine, Ohio, Rhode Island and Vermont) joined Massachusetts in filing an *amicus curiae* (friend of the court) brief in support of the Minnesota position. The National Guard Associa-

tion of the United States (NAGUS) filed a *amicus curiae* brief in opposition to Minnesota's motion for summary judgment and in support of the United States Department of Defense's motion to dismiss. The NGAUS brief was joined by seven states ( Oklahoma, Illinois, Nevada, Wisconsin, Florida, South Carolina and New Mexico ) as well as the Adjutants General Association of the United States and the Enlisted Association of the National Guard of the United States. Prior to the hearing, three states (Rhode Island, Louisiana and Kansas) withdrew from the Massachusetts brief. Upon withdrawal, the State of Louisiana joined and adopted the brief of NGAUS.<sup>11</sup>

Proceedings before the United States District Court, District of Minnesota, in June 1987 revealed three separate and distinct aspects to this issue; one exemplified by the U.S. Department of Defense, one exemplified by the State of Minnesota and one expressed by NGAUS. Because this is a case of first impression and of such significance as to its eventual outcome, each position must be examined in greater detail.

#### **Position of the State of Minnesota**

The Militia clause, on its face, reserves to the states the authority of training the militia in accordance with training requirements prescribed by Congress. The Supreme Court has determined that the National Guard is the modern militia reserved to the states by Article I, Section 8, clause 15 and 16 of the Constitution.<sup>12</sup> While most powers of the states are not enumerated expressly in the Constitution, the Constitution could hardly be more explicit in setting forth the separate roles of the federal and state governments with respect to the militia. The Constitution defines the states authority over the militia in part by its express language:

To provide for organizing, arming and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of Officers, and the Authority of training the Militia according to the discipline prescribed by Congress:<sup>13</sup>(emphasis added)

Black's Law Dictionary defines "reserved power" as "power specifically withheld because not mentioned or reasonably implied in the other powers conferred by a constitution or statute."<sup>14</sup> Thus the state's authority to train the militia is set aside by the Militia clause from other grants of authority allocated to Congress. The phrase, "according to the discipline prescribed by Congress", permits Congress to require particular training exercises to be performed once the state has consented to the training. This is a constituted grant to the state and it simply cannot be interpreted to limit the states role to that of a drill sergeant which is essentially what the federal position would lead to. The constitution does not read the power to oversee training according to the dictates of Congress, it says the authority over training.<sup>15</sup>

The Militia clause reflects a careful compromise in the allocation of federal and state powers, which followed an extensive debate among the framers of the Constitution. Three themes emerge from those debates: (1) the framers' interest to preserve the states' control over training the militia; (2) the desire to place a check upon the federal government; and, (3) their perception that the local citizen input in the militia should be preserved.<sup>16</sup> A fear of unchecked federal power generally and large standing armies in particular compelled the framers of the Constitution to preserve an independent state militia that could be called into federal service only for a limited time.<sup>17</sup>

A fundamental principle of constitutional interpretation is that all applicable provisions must be read together and construed in harmony to the greatest extent possible. Reading the Constitution harmoniously preserves the framers goal in adopting the Militia clause and the Army clause. An harmonious

reading, giving meaning to both is not difficult to express.

Congress may raise federal armies, may provide for organizing, arming and disciplining the militia, and may provide for such part of the militia as may be employed in the service of the United States as long as it does not appoint officers of the militia and does not exercise any authority over the training of the militia (without the state's consent) beyond prescribing 'the discipline' of the training to be conducted by the states. <sup>18</sup>

The Congressional power to prescribe a uniform discipline for training was required in order that the militia would be prepared to function with federal forces when called into federal service. Because the "Montgomery Amendment" cannot be construed as prescribing the 'discipline' but rather purports to allow the President to exercise the authority over training the militia, it is an invalid usurpation of the state power.

Over the years, Congress has consistently acknowledged the state reserved powers over the peacetime training of their militia. In 1903, Congress in the "Dick Act" recognized state power by allowing army instructors to come into the states only at the request of the governor. Provisions of this act were hailed by Secretary of War Elihu Root for:

....meeting the approval of those most directly interested in the development of the constitutional militia, including its provisions for the ordinary training and discipline of the militia as a force belonging, in time of peace, to the several states....<sup>19</sup>

The "National Defense Act of 1916" expressly acknowledged the constitutional requirement for state control over the National Guard in peacetime by providing that:

....nothing contained in this Act should be construed as limiting the rights of the States and Territories in the use of the National Guard within their respective borders in time of peace....<sup>20</sup>

In the "National Defense Act of 1933", the peacetime control of the National Guard in the States was recognized by Congress which was advised that:

The primary purpose of this bill is to create the National Guard of

the United States, both in time of peace and in war, reserving to the states their right to control the National Guard or the Organized Militia absolutely under the Militia Clause of the Constitution in time of peace.<sup>21</sup>

In addition, the 1933 Act gave the state governors veto power over any changes "in allotment, branch, or arm of units organizations wholly within a single state...."<sup>22</sup> Through the "Armed Forces Reserve Act of 1952", the Congress made it clear that when the National Guard was called to active duty for training purposes, the governor must consent. As originally proposed the 1952 bill would have allowed federal authorities to transfer reserve officers to state national guard units without state concurrence. Congress was flooded with letters from state national guard officers who supported the wisdom of the framers of the constitution when they wrote the Militia clause. To counter what it perceived as the federalization of the Guard, the National Guard Association of the United States proposed an amendment requiring the consent of the governor of the state before National Guard units could be called to active duty. The consent provision was included and it existed until 1986 when the Montgomery Amendment was passed.<sup>23</sup>

In response to the assertion that the states are interfering with the foreign policy of the United States, the framers' conception of the Constitution did not place the states at odds with the conduct of federal foreign policy under the Constitution. Because they placed the training of the Militia under the authority of the states, that training can not be 'an instrument of foreign policy' that is available to the federal government.<sup>24</sup>

#### Position of the United States Department of Defense

The National Guard of the United States is a critical component of the United States Armed Forces and is essential to the first line defenses of the United States. Upon being ordered to active duty, the National Guard operates



as an active component of the regular United States Army and Air Force. When not serving on active duty, the National Guard of the United States has two distinct roles: (1) it is a reserve component of the United States Army and Air Force, and at the same time (2) functions as each individual state's National Guard.<sup>25</sup> The term National Guard refers to two overlapping but legally distinct organizations. The understanding of this dual status is the key to the issue of federal / state conflict concerning the National Guard.

In 1933, Congress created a federal reserve component called the National Guard of the United States. They did this under the authority of the Army clause of the Constitution which gives Congress complete power over national defense matters. Thus the 1933 act created the present dual status of the National Guard in which "every guardsmen is a Federal reservist as well as a State militiaman."<sup>26</sup> Once Congress created this new federal reserve component it had the full authority to regulate all aspects of it including training in peacetime. There is no limitation in the Militia clause that impacts on Congress' plenary power under the Army clause. As far back as 1918, the Supreme Court has recognized this principle.<sup>27</sup> What the state of Minnesota seeks to have declared unconstitutional is in realty, legislation concerning the active duty of the Army and th Air Force Reserves, over which the states have no authority.<sup>28</sup>

Under the Army clause, Congress and the President have plenary authority to regulate the organization and disposition of these forces, including their assignment outside the United States. But even under the Militia clause these state units, once they are called to active duty - as they are when they are placed on active duty status and sent overseas - are fully subject to control by Congress and the President.<sup>29</sup> The language of the Militia clause supports Congress' exercise of federal authority over training for the National Guard

when on active duty, vesting in Congress the power "for governing such part of them (the militia) as may be employed in the service of the United States." The key is "employed in the service of the United States". There is no question that the National Guard under the "Montgomery Amendment" is in federal service.<sup>30</sup>

There is nothing in the Militia clause that speaks in terms of a foreign affairs power for the states. These powers are listed elsewhere in the Constitution and are committed to the Executive and Legislative branches of the Federal Government. Those states who have refused to comply with the "Montgomery Amendment" have attempted to influence foreign policy and national defense decisions by vetoing active duty missions of the National Guard of the United States based upon their political views of American foreign policy toward a given country.<sup>31</sup>

The debate over the Montgomery Amendment focused on active duty missions in Honduras. But Honduras is not the issue. If the Montgomery Amendment were overturned, then each time an overseas mission implicated foreign policy concerns, fifty-four executives of state national guards would be capable of frustrating the interests of the United States. Having been given the power over national defense under Article I, Congress, by the Montgomery Amendment, has removed from the states the ability to take actions which are intended to interfere with the foreign policy responsibilities of the Legislative and Executive branches. This does not violate the Constitution. Quite the contrary, it represents an exercise of Congressional power fully in accord with the Constitution's federal plan.<sup>32</sup>

When the Army clause and the Militia clause are properly read, it becomes clear that the "Montgomery Amendment" doesn't conflict with any power delegated to the states under the Militia clause. To conclude otherwise would mean that the federal government doesn't have control over an significant portion of its national defense forces.

## Position of the National Guard Association of The United States (NGAUS)

The issue is: "what are the constitutional boundaries of the concurrent, but not congruent spheres of authority of the Congress and the States over the peacetime training of the National Guard?" 33

NGAUS seeks to preserve the historic balance between federal and state power which has produced the current blend of state and federal control over peacetime training of the Army and Air National Guard mandated by the Militia Training Clause of the Constitution and which has withstood the test of time and changing circumstances....It seeks to preserve the sovereign power of the states to conduct the peacetime training of the National Guard guaranteed by the Constitution, while preserving the constitutional right of the Congress to prescribe the content of that training, including location, purpose, type and schedule of such training.<sup>34</sup>

The Militia clause by its plain language gives neither the state governors nor the Congress exclusive and unlimited authority over the peacetime training of the state militia, but provides for a sharing of such authority by the states and the Congress. The Militia clause reflects a careful compromise of the federal and state powers, which followed an extensive debate among the framers of the Constitution. The delegates to the Constitutional Convention were seeking to provide the Federal Government with a means to provide for the common defense while retaining sufficient military forces reserved to state control to oppose, if necessary, a central government that might become oppressive. To this end, several principles emerge from the records of the debate.

- (1) Reliance upon a large standing army was reduced by reliance upon an effectively organized, armed and trained state militia.
- (2) Each state was to have a militia organized, armed and trained to a uniform standard which would permit their being integrated with the standing army.
- (3) To achieve this, each state militia as well as the standing army

would have to be uniformly organized, armed and trained to a common discipline.

The consequence of this compromise was that the states, in peacetime, were to conduct the training of their respective militias to a standard of professionalism prescribed by Congress. In essence, the militia training clause made the states nothing more than 'drill-sergeants', as Mr. Gerry noted with concern during the constitutional debates.<sup>35</sup>

The battlefield on which today's Guardsmen may be called upon to fight is not the battlefield of 1787. The modern Guardsman must train to maintain and operate highly technical equipment in the wide variety of climatic and geographical conditions in which they may have to live and fight. Quite often these climatic and geographical conditions do not exist within the United States or if they do exist, the large maneuver areas required are not available. If it is necessary to train the regular military in potential conflict areas overseas, then, based upon the concept of uniformity, guardsmen cannot rationally be limited to training consisting only of general principles that enable them to respond to orders from federal officers.<sup>36</sup>

The procedure authorized by the Militia clause is working as the framers intended. The Congress allocates equipment and funds to the states National Guard, and specifies the types of units each state is to form. The Department of Defense specifies the skills that must be developed by those units and schedules realistic field exercises (frequently overseas) to determine if the units have developed the required competence. National Guard officers, whom the states select, marshal the allocated resources, develop training plans and conduct the field exercises prescribed. National Guard units in peacetime are commanded only by National Guard officers, as the framers intended, even when

engaged in overseas exercises.<sup>37</sup>

For thirty-five years the dual status of the National Guard was governed by the "Armed Forces Reserve Act of 1952". Through statutory provision, Congress delegated to the governors of the states a portion of their constitutional power by requiring the consent of the governors to any training that their National Guard units were directed to conduct. In 1985, a political element was injected into what had been a stable and successful working relationship. There is no question that the interjection of this political aspect into a military affair compromises the training of the National Guard as a component of the Total Force.

The "Montgomery Amendment" was enacted to:

....maintain the historic blend of state and federal control over the National Guard which will be radically altered to the severe detriment of the National Guard as a professional military force, as well as to the nation's Total Force Policy if the shortsighted views of the Plaintiffs and supporting amici prevail....The Montgomery Amendment continues to permit the National Guard, organized under the authority of the respective states, to serve state needs but clearly states that the specification of a training location outside the United States, its territories and possessions for unit and individual members of the National Guard of the various states is solely within the constitutional authority of Congress to prescribe and wholly beyond the legal authority of the states to ignore in conducting National Guard training....The Montgomery Amendment responds to the legitimate and important concern raised by the Defense Department in response to the governor's objections, by amending current statutes in a way which upholds the letter and spirit of the Militia Training Clause by an explicit statutory statement of what constitutes the training 'prescribed by Congress'.<sup>38</sup>

#### Decision of the United States District Court

The constitutionality of the Montgomery Amendment was upheld by Donald D. Alsop Chief United States District Judge, District of Minnesota, on August 3, 1987. In his decision, Judge Alsop noted:

Although this action arises out of a dispute between the parties over the propriety of deploying elements of the Minnesota Unit of the National Guard to Central America for training purposes, the court

emphasizes that the wisdom of that deployment is in no sense an issue in this case. Judgment as to the wisdom of this program lies exclusively within the purview of the political branches of government. This court must determine only whether Congress has the power to act as it has.<sup>39</sup>

Citing Frederick Wiener in The Militia Clause of the Constitution, Judge

Also set the statutory background for his decision stating:

The term 'National Guard' refers to two overlapping, but legally distinct, organizations. Congress, under its constitutional authority to 'raise and support armies' has created the National Guard of the United States, a federal organization comprised of state national guard units and their members.<sup>40</sup>

Judge Also concluded that in 1933 when Congress created the National Guard of the United States as a reserve component of the Army, they did so under the Army clause and not the Militia clause. Because Congress' authority to provide for the National Defense is plenary, the Militia clause cannot constrain the authority to train the National Guard as it determines appropriate when the Guard is called to active federal service.

As the Militia clause does not restrain Congress' authority to train the National Guard while the Guard is in active federal service, the gubernatorial veto found in section 672(b) and 672 (d) is not constitutionally required. Having created the gubernatorial veto as a accommodation to the states, rather than pursuant to a constitutional mandate, the Congress may withdraw the veto without violating the Constitution.<sup>41</sup>

Judge Also also concluded that the state governors retain their authority over training the Guard when under title 32 U.S. Code control as the state's militia but must relinquish such authority over training units ordered to overseas duty 'in the service' of the United States under title 10 U.S. Code.

When Congress so acts, the language of the Militia clause is relevant only insofar as its provision granting Congress authority "for governing such part of (the militia) as may be employed in the service of the United States," makes it clear that the reservation to

the states of the appointment of officers and the authority of training does not restrict the authority of Congress to govern the National Guard while it is in federal service.<sup>42</sup>

Judge Alsop added in a footnote, that the utilization of the National Guard as the pre-eminent reserve component of the Total Force reduces the requirement for a large standing army consistent with the framers intent.

Shortly after the Minnesota Court's decision, Governor Perpich announced that he would appeal dismissal of the suit, Governor Celeste of Ohio said that he would join in that appeal.<sup>43</sup> Argument was held February 9, 1988 in the United States Court of Appeals for the Eight Circuit. Regardless of the decision, it is reasonable to assume that an issue of first impression of this importance will be appealed to the Supreme Court.

#### ENDNOTES

1. James Kitfield, "Who Controls The Guard?", Military Logistics Forum, (October 1986), p. 53.

2. Fred Hiatt, "Governors Wary of Sending Guard Troops to Honduras", Washington Post, April 5, 1986, p. A-1.

3. U.S. Laws. Statutes. United States Code Annotated, 1983, Title 10, Section 672 (b)(d), pp. 265-266.

4. U.S. Congress, House, Committee on Armed Services, National Defense Authorization Act for FY 87, p.176.

5. Philbin, "States Rights", p. 22 .

6. David S. Broder, "Hands Off National Guard, Governors Say", Washington Post, August 27 1986. p. A-5.

7. Newland, The Militia's Role in National Defense: A Historical Perspective, p. 26.

8. Philbin, "States Rights", p. 22.

9. Public Law Number 99-661, 100 Stat 3816-3871, (hereafter referred to as the Montgomery Amendment).

10. Philbin, "States Rights", p. 21.

11. Perpich v. United States Department of Defense, United States District Court, District of Minnesota, Third Division, Motions Before the Honorable Donald D. Alsop Chief Judge, June 15, 1987.

12. See Maryland v. United States, 381 U.S. 41,46 vacated and modified on other grounds on rehearing, 382 U.S. 159 (1965).

13. Constitution of the United States, Article I, Section I, Clause 16.

14. Black's Law Dictionary, 5th ed. 1979, p 1176.

15. Perpich v. United States Department of Defense, United States Court of Appeals for the Eighth Circuit, Brief of Appellants (Minnesota), pp. 7-8 (hereafter referred to as Minnesota Brief, Eighth Circuit).

16. Perpich v. United States Department of Defense, United States Court of Appeals for the Eighth Circuit, Brief of Amici Curiae Massachusetts, et al, p.5 (hereafter referred to as Amici Massachusetts, Eighth Circuit).

17. Minnesota Brief, Eighth Circuit, p. 9-10.

18. Amici Massachusetts, Eighth Circuit, p. 20.

19. U.S. Congress, House, Committee on Militia, Efficiency Of The Militia, p.2.

20. Act of June 3, 1916, National Defense Act of 1916, now codified at Title 32 U.S.C Section 109(b)(1982).

21. "National Guard Bill of 1933", p. 5.

22. Act of June 15, 1933, 1933 Amendments to the National Defense Act of 1920, now codified at Title 32 U.S.C. Section 104(c)(1982).

23. Minnesota Brief, Eight Circuit, p. 23-28.

24. Perpich v. United States Department of Defense, United States District Court, District of Minnesota, Third Division, Memorandum of Law Amici Curiae Massachusetts et. al, p. 32.

25. Perpich v. United States Department of Defense, United States Court of Appeals for the Eighth Circuit, Brief of Appellees (DOD), p. 1 (hereafter referred to as DOD Brief, Eighth Circuit).

26. U.S. Congress, Armed Forces Reserve Act of 1951 p. 9

27. "Selective Draft Law Cases", 245 U.S. 366 (1918)

28. DOD Memorandum, District of Minnesota, p. 3.

29. Ibid. p. 2.

30. DOD Brief, Eighth Circuit, p. 16.



31. DOD Memorandum, District of Minnesota, p. 3.
32. Ibid. p. 33.
33. Perpich v. United States Department of Defense, United States Court of Appeals for the Eighth Circuit, Brief of Amicus Curiae National Guard Association of the United States, p. 2 (hereafter referred to as *Amicus* NGAUS, Eighth Circuit).
34. Perpich v. United States Department of Defense, United States District Court, District of Minnesota, Third Division, Memorandum of Law of Amici Curiae National Guard Association of the United States, p. 2 (hereafter referred to as *Amicus* NGAUS (District of Minnesota)).
35. Ibid. pp. 15-16.
36. Ibid. pp. 17-18.
37. Ibid. p. 21.
38. *Amicus* NGAUS, Eighth Circuit, pp. 19-20.
39. Perpich v. United States Department of Defense, United States District Court, District of Minnesota, Third Division, Memorandum Order, Judge Donald D. Alsop, p. 6.
40. Ibid. p. 2.
41. Ibid. pp. 10-11.
42. Ibid. p. 12.
43. Reid K. Beveridge, " Judge Rules Against Perpich: Montgomery Amendment Upheld", National Guard (September 1987), p. 18.

## CHAPTER V

### CONCLUSION

More than likely, the conclusion to this military study will not be written until 1989 or 1990 when the Supreme Court of the United States rules upon *Perpich v. United States Department of Defense*. In the final analysis, the "Montgomery Amendment" will be upheld. To conclude otherwise would destroy the credibility of both the Army and Air National Guard as full and reliable partners in the "Total Force". The introduction of a political element into a military matter has been motivated solely by opposition to Federal policies outside the proper scope of state authority. This interjection has not only compromised the training of those National Guard units prevented from training in Central America but also the training of their associate units both in the National Guard and the active Army and Air Force.

The "Montgomery Amendment" was enacted to maintain the historic blend of state and federal control of the National Guard which would be radically altered, to the detriment of the National Guard, if the shortsighted views of Minnesota prevail. Today it is impossible to train large numbers of soldiers and airmen within the United States for conflicts in climatic and geographical conditions which do not exist in the United States. Personnel of the National Guard, like those of the regular Army and Air Force must routinely be sent to overseas training locations in order to develop and maintain the skills required of today's warrior. Minnesota's position would force the nation, in time of war, to send thousands of improperly trained Guardsmen into a complex technological conflict in conditions with which they would be totally unfamiliar. The inevitable result would be wholesale casualties and possible defeat because of Guardsmen trained to the military standard of 1787.<sup>1</sup>

With the advent of the Total Force Policy, the role of the National Guard

has been fully integrated into every defense scenario. The Guard has grown in numbers of units and in modern equipment. The support that the Guard has received is related to the reliance and trust placed upon it. This has also placed a great responsibility on the military and civilian leaders of the National Guard to ensure that their soldiers and airmen have every opportunity to receive the best and the most relevant training possible. The kind of training that ensures that the Guardsmen can fight and win and have the best chance of survival on the future battlefield. LTG Emmett H Walker Jr. (ret) has stated:

That's the bottom line, the reason we have seen the diversification of National Guard training here and abroad - is to ensure we meet our moral and ethical obligations to our people. Our people expect the best training we can provide. And we owe them no less than the best we are able to give.<sup>2</sup>

The soldiers and airmen of the Army and Air National Guard find themselves, in peacetime, actively engaged in tough training missions, which is the direction that must be taken if overall operational readiness is to be improved. The governors and state legislatures must become better educated about the importance of the federal mission and why the guard and the state have an interest in permitting and supporting overseas training in support of that mission.

#### ENDNOTES

1. Amicus NGAUS, Eighth Circuit, p. 16-17.
2. Emmett H. Walker, Jr. "National Guard Training In Central America", Return Fire National Guard (September 1986), p. 2, 52.

## BIBLIOGRAPHY

1. Beveridge, Reid K. "Judge Rules Against Perpich: Montgomery Amendment Upheld", National Guard, September 1987. pp. 18-21,47.
2. Black's Law Dictionary, 5th ed. St. Paul: West Pub. Co., 1979.
3. Broder, Davis S. "Hands Off National Guard, Governors Say", Washington Post. August 27, 1986. p. A-5.
4. Conaway, John B. "Roar Of Freedom", The Officer, February 1987. pp. 120-127.
5. Crowe, William J., Jr. "Reserves Fill Need Worldwide", The Officer, February 1987. pp. 20-24.
6. Dean, Richard D. "Measure Of Service Meaningful", The Officer, February 1987. pp. 112-119.
7. Donohue, Dan. "Yesterday - Today - Tomorrow: The National Guard In The Total Force", National Guard, April 1987. p. 20.
8. Gordon, Sol, Executive Editor. 1987 National Guard Almanac. Washington: Uniformed Services Alamanac, Inc. 1987.
9. "Governors Under Pressure To Send Guard Units Abroad", Washington Post. June 18, 1986. p. A-34.
10. Hiatt, Fred. "Governors Wary of Sending Guard Troops to Honduras", Washington Post. April 5, 1986. p. A-1.
11. Hunter, Robert W. "The Reserve Forces and the Total Force Concept", Air Force, January 1973. pp. 54-59.
12. Jacobs, Bruce. "Honduras Is Not The Issue", Notebook, National Guard, April 1986. p. 82.
13. Jacobs, Bruce. "The Year Of The Constitution", Notebook, National Guard, April 1987. p. 102-101.
14. Jordan, Frank. "A Maine Guardsman Visits Honduras", National Guard, October 1986. pp. 36-39.
15. Mahon, John K. History of the Militia and the National Guard. New York: Mac Millan Publishing Company, 1983.
16. Kitfield, James. "Who Controls The Guard?", Military Logistics Forum, October 1986. pp. 52-57.
17. Newland, Samuel J. The Militia's Role in National Defense: A Historical Perspective. Carlisle Barracks Pennsylvania: Strategic Studies Institute, U.S. Army War College, 1987.

18. "NGAUS Amicus Curiae Brief As Filed In U.S. District Court", National Guard, September 1987. pp. 22-29.

19. Perpich v. United States Department of Defense. United States District Court, District of Minnesota, Third Division. Motions Before the Honorable Donald D. Alsop, Chief Judge. June 15, 1987.

20. Perpich v. United States Department of Defense. United States District Court, District of Minnesota, Third Division. Defendant's Memorandum of Law (DOD). April 3, 1987.

21. Perpich v. United States Department of Defense. United States District Court, District of Minnesota, Third Division. Memorandum of Law of Amici Curiae National Guard Association of the United States.

22. Perpich v. United States Department of Defense. United States District Court, District of Minnesota, Third Division. Memorandum of Law Amici Curiae Massachusetts et. al.. May 22, 1987.

23. Perpich v. United States Department of Defense. United States District Court, District of Minnesota, Third Division. Memorandum Order, of Judge Donald D. Alsop. August 3, 1987.

24. Perpich v. United States Department of Defense. United States Court of Appeals for the Eighth Circuit. Brief of Appellees (DOD). October 9, 1987.

25. Perpich v. United States Department of Defense. United States Court of Appeals for the Eighth Circuit. Brief of Appellants (Minnesota). September 9, 1987.

26. Perpich v. United States Department of Defense. United States Court of Appeals for the Eighth Circuit. Brief of Amici Curiae Massachusetts, et. al.. September 9, 1987.

27. Perpich v. United States Department of Defense. United States Court of Appeals for the Eighth Circuit. Brief of Amicus Curiae National Guard Association of the United States. 666 F. Supp. 1319 (D.Minn. 1987).

28. Philbin, Edward J. "States' Rights", National Guard, April 1987. pp. 21-26.

29. "Representative G.V. 'Sonny' Montgomery Speaks Out", National Guard, September 1986. pp. 28-29.

30. Stroud, Ansel M., Jr. "Keeping The Militia Alive And Well", President's Message, National Guard, March 1987. p. 2.

31. Stroud, Ansel M., Jr. "We Must Unite To Retain The Montgomery Amendment, President's Message", National Guard, April 1987. p. 2.

32. Stroud, Ansel M., Jr. "The Bicentennial Of The Constitution And The Militia Clause, President's Message", National Guard, September 1987. p. 2.

33. Temple, Herbert R., Jr. "Minute Men Of The '80s". The Officer, February 1987. pp. 108-111.
34. "The Strength Of The Guard Is The State - Federal Connection" Editorial, National Guard, September 1986. p. 2.
35. "The Total Force", National Guard, April 1987. pp 76-78.
36. U.S. Laws, Statutes. Constitution of the United States.
37. U.S. Laws, Statutes. United States Code Annotated. 1983 ed. St. Paul Minn.: West Publ. Co., 1983. Title 10, sec. 672.
38. United States Code Congressional and Administrative News. 82d Cong., 2d Sess. St. Paul: West Publ. Co., 1952. Vol. 1, pp. 460-487: "Armed Forces Reserve Act of 1952".
39. U.S. Congress. House. Committee on Militia. Efficiency Of The Militia. H. Rpt. 1094, 57th Cong., 1sst Sess. Washington: Government Printing Office, 1902.
40. U.S. Congress. House. Committee on Military Affairs. National Guard Bill of 1933. H. Rpt. 141, 73d Cong., 1st Sess. Washington: Government Printing Office, 1933.
41. U.S. Congress. House. Committee on Armed Services. Armed Forces Reserve Act of 1951. H. Rpt. 1066, 82d Cong., 1st Sess. Washington: Government Printing Office, 1951.
42. U.S. Congress. House. Hearings on H.R. 4860 Before the House Committee on Armed Services. Reserve Components Bill, 82d Cong., 1st Sess. Washington: Government Printing Office, 1951.
43. U.S. Congress. Senate. Hearings on H.R. 5426 Before the Senate Subcommittee for Armed Services. Armed Forces Reserve Act, 82d Cong., 2d Sess. Washington: Government Printing Office, 1952.
44. U.S. Congress. House. Committee on Armed Services. National Defense Authorization Act for FY 87. H. Rpt. 718, 99th Cong., 2d Sess. Washington: Government Printing Office, 1986.
45. United States Supreme Court. United States Reports Adjudged in October Term. Selective Draft Law Cases, Ernest Knaebel Reporter. New York: Banks Law Pub. Co., 1918. Vol. 245. p. 366. 245 U.S. 366.
46. United States Supreme Court. United States Reports Adjudged in October Term. Maryland v. United States, Henry Putzel Jr. Reporter. Washington: U.S. Govt. Print. Off., 1965. Vol. 381. p. 159. 381 U.S. 41.
47. Walker, Emmett H. Jr. "National Guard Training In Central America, Return Fire", National Guard, May 1986. p 2,52.

48. Washington, George. In a letter to Congress September 24, 1776. Reprinted in The Writings of George Washington from the Original Manuscript Sources, John C. Fitzpatrick ed., Washington: U.S. Govt. Print. Off., 1932, Vol. 6. pp. 106, 112.

49. Washington, George. In a letter to Lt. Colonel Alexander Hamilton May 2, 1783. Reprinted in The Writings of George Washington from the Original Manuscript Sources, John C. Fitzpatrick ed., Washington: U.S. Govt. Print. Off., 1938, Vol. 26. pp. 374-375.

50. Webb, James H., Jr. "Unique Progress Made in Readiness". The Officer, February 1987. pp. 26-33.

51. Weber, La Vern E. "State Control Issue: Words For Friends and Foes" Capital Focus", National Guard, August 1987. p 10,14.

52. Wiener, Frederick B. "The Militia Clause of the Constitution", Harvard Law Review, December 1940. pp. 187-197.

53. Wright, Robert K., Jr. "Citizens, Soldiers and the Constitution", National Guard, September 1987. pp 33-41.

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